90-1863

No._____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WALKER L. CHANDLER and
CAROLE ANN RAND,
Petitioners,

vs.

GEORGIA PUBLIC TELECOMMUNICATIONS
COMMISSION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the court of appeals incorrect in reversing the district court's order granting injunctive relief, which order prohibited government officials from excluding Petitioners from a public forum for political speech in violation of their rights under the first and fourteenth amendments to the United States Constitution?
2. Is the first amendment guaranty of free speech violated by the actions of a state-owned television broadcaster, when that broadcaster excludes a candidate for elective office from a forum for political speech based upon the content of that candidate's speech?
3. Is the fourteenth amendment guaranty of equal protection violated by the actions of a state-owned television broadcaster, when that broadcaster excludes a ballot-qualified candidate from a forum for political speech while making that forum available to other ballot-qualified candidates who are similarly situated?

PARTIES TO THE PROCEEDING

Plaintiffs/Petitioners:

Walker L. Chandler
Carole Ann Rand

Defendants/Respondents:

Georgia Public Telecommunications Commission
Dr. Richard E. Ottinger
Frank Bugg
Bill Johnston
Frank Jones
Robert James
Dr. Werner Rogers
Dr. Dean Propst
Jackie Ward
Lovick Corn
Kenneth Breeden
William Allison

Intervenors/Respondents:

The Atlanta Journal
The Atlanta Constitution

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Walker L. Chandler and Carole Ann Rand pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 31, 1990.

OPINIONS BELOW

The United States District Court for the Northern District of Georgia, Atlanta Division, entered an order and opinion on October 18, 1990, granting Petitioners' motion for a temporary restraining order.

The United States Court of Appeals for the Eleventh Circuit entered an order on October 31, 1990, vacating the district court's grant of the temporary restraining order, and on March 1, 1991, denied Petitioners' petition for rehearing and suggestion of rehearing *en banc*.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed is the order of the United States Court of Appeals for the Eleventh Circuit dated October 31, 1991.

A petition for rehearing and suggestion of rehearing *en banc* to the Eleventh Circuit Court of Appeals was denied on March 1, 1991.

This Court has jurisdiction to review the judgment of the Eleventh Circuit Court of Appeals by virtue of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 17, 1990, Walker L. Chandler ("Chandler"), the duly qualified candidate of the Libertarian Party of Georgia for the office of lieutenant governor of the State of Georgia, filed his Complaint and Motion for Temporary

Restraining Order in the United States District Court for the Northern District of Georgia, seeking injunctive and declaratory relief against the Georgia Public Telecommunications Commission ("GPTC"), an instrumentality of the State of Georgia. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331.

Political debates were scheduled to be televised on GPTC's member television stations between the Democratic and Republican candidates for the office of lieutenant governor (aired on Friday, November 2, 1990), and the office of governor (aired on Sunday, November 4, 1990). The Complaint alleged *inter alia* that GPTC's decision to exclude Chandler and Libertarian gubernatorial candidate Carole Ann Rand ("Rand") from the debates violated their first amendment right to free speech and fourteenth amendment right to equal protection.

On October 3, 1990, GPTC moved to dismiss the Complaint, asserting as grounds therefor that (1) the district court lacked subject matter jurisdiction over the claims; and (2) GPTC was immune from liability pursuant to the eleventh amendment to the United States Constitution. The district court heard oral argument on the pending motions on October 4, 1990. Subsequently, the district court allowed Chandler to add as defendants the members of GPTC in their individual capacities. The court also permitted Rand to intervene as a plaintiff.

On October 18, 1990, the court conducted an evidentiary hearing regarding the reasons for GPTC's decision to exclude Chandler and Rand from the proposed debates. On that same day, the court issued its Order, which is the subject of the instant case, enjoining Respondents from televising either proposed debate unless they included the Libertarian candidates.

On October 19, 1990, the district court granted the motion to intervene of the Atlanta Journal and the Atlanta

Constitution for purposes of the appeal and also certified its Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Respondents timely filed notices of appeal and petitioned for permission to appeal pursuant to 28 U.S.C. § 1292(b). Respondents also moved to expedite the appeal and for a stay of the district court's order. The Eleventh Circuit Court of Appeals granted the motions for expedited appeal and for stay on October 26, 1990.

On October 30, 1990, the Eleventh Circuit heard oral argument and on the following day issued its opinion permanently vacating the district court's order and remanding the case to the district court with instructions to dismiss the Complaint. Chief Judge Clark filed a dissenting opinion. Petitioners timely filed a petition for rehearing and suggestion of rehearing *en banc* with the Eleventh Circuit, which were denied by that court on March 1, 1991.

ARGUMENT

I. THE EXCLUSION OF PETITIONERS FROM THE DEBATES WAS AN UNCONSTITUTIONAL RESTRICTION OF THEIR FIRST AMENDMENT RIGHT TO FREE SPEECH.

A. *Petitioners' Speech Is Protected "Core Political Speech" Within The Scope Of The First Amendment.*

Petitioners were candidates for political office, duly nominated by an established, recognized, ballot-qualified political body. GPTC excluded Petitioners from participating in debates between candidates for the offices they were seeking. These debates took place mere days before the citizens of Georgia went to the polls. Petitioners' speech clearly falls within that category of speech which receives the highest constitutional protection: core political speech.

The Court has defined "core political speech" as "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Core political speech is entitled to "First Amendment protection. . . 'at its zenith.' " *Id.* at 425 (*quoting Grant v. Meyer*, 828 F.2d 1446, 1456-57 (10th Cir. 1987)). The Court has stated that the first amendment itself "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

Relatively broad discretion may be exercised in the regulation of lesser categories of speech, such as commercial speech and obscene material. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1975); *Valentine v. Chrestenson*, 316 U.S. 52 (1942). However, any exercise of government regulation over core political speech is "subject to exacting scrutiny." *Meyer*, 486 U.S. at 420.

With respect to this case, no more telling example of "interactive communication concerning political change" can be imagined than debates between candidates for political office held only a few days before the elections. Petitioners' speech is clearly core political speech, and any restrictions on that speech must be subjected to the strictest constitutional review.

B. *Respondents Excluded Petitioners From A Public Forum.*

1. The Debates, Not GPTC's Broadcast Facilities, Were The Forum.

The Eleventh Circuit construed the "forum" in this case to be GPTC's broadcast facilities, stating that GPTC does not function as a "marketplace of ideas," and that therefore the state is permitted to regulate the content of speech. Appendix at A-4. The court below, however, misapprehended the nature of the "forum" implicated here.

The district court, in granting the injunctive relief sought by Petitioners, relied on *Kelley v. WMUL-TV,* 7 Med.L.Rptr. 1094 (S.D.W.Va. 1980). Appendix at A-29. *Kelley* involved a factual setting indistinguishable from the facts in this case. In *Kelley,* a Libertarian gubernatorial candidate was denied participation in debates which were broadcast on public television, held between the Republican and Democratic candidates for governor of West Virginia. The court granted a temporary restraining order, finding that the government had engaged in unconstitutional content-based discrimination against the Libertarian candidate's speech. The *Kelley* court determined that it was the live political debate itself which is the forum, not the broadcast facilities. *Id.* at 1097. In the case at bar, GPTC's broadcast facilities were simply the medium through which the public forum of the political debates was transmitted to the public.

The Court utilized a similar forum analysis in *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. 788 (1984). In *Cornelius,* a legal defense and political advocacy organization sought to participate in the Combined Federal Campaign ("CFC"), a charity drive conducted in the federal workplace. The petitioner argued that a first amendment forum required tangible government property, while the respondents contended that the forum should be defined in terms of the access sought by the speaker. *Id.* at 801. The Court agreed with the respondents, stating that:

> [w]e agree with respondents that the relevant forum for our purposes is the CFC. Although petitioner is correct that as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker.

Id. See also Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1982) (forum defined as school's internal mail system and teachers' mailboxes, notwithstanding that an "internal mail system" lacks a physical situs); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (forum defined as advertising spaces on city-owned buses).

In the case *sub judice,* the district court did not find, nor did Petitioners assert, any general right of access to the media. Rather, Petitioners sought access to the debates. Just as in Cornelius, the right of access was sought not to the physical facility, but to the communicative activity being held at the facility.

2. The Debates Were A Public Forum.

In reviewing a government decision to exclude a speaker from a forum, the Court must determine the nature of the forum involved. The debates in this case were a public forum. In *Perry,* 460 U.S. at 45, the Court defined as "quintessential public forums" those places "which by long tradition or government fiat have been devoted to assembly and debate" and which "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." From the famous orations of Clay and Webster through the Lincoln-Douglas debates, there is a long tradition in this country of discussion and debate upon public issues, especially between candidates for elective office. Live debates between political contenders must certainly be considered part of such "quintessential public forums."

When a public forum is involved, the state's ability to limit freedom of expression is sharply circumscribed. *Perry,* 460 U.S. at 45. "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius,*

473 U.S. at 800. Respondents' justification for the exclusion of Petitioners does not satisfy this constitutional standard.

C. *Respondents' Justification For The Exclusion Of Petitioners From The Debates Does Not Satisfy The Requisite Constitutional Standard.*

The exclusion of Petitioners from the debates was content-based discrimination by Respondents. It was neither based on a compelling state interest, nor narrowly drawn to achieve such an interest. The district court found after hearing evidence submitted by Respondents at the October 18th hearing that "[t]he basis articulated by [Respondents] is not even an attempt to mask their content-based motivations." Appendix at A-49. Respondents stated the following as reasons for the exclusion of Petitioners from the debates:

> Were its air waves [sic] open for unrestricted access to all citizens, the GPTC would be unable to operate within the guidelines set by Congress through enactment of the Federal Communications Act. . . . GPTC clearly has as its legitimate purpose the dissemination of newsworthy information in a format it judges to be responsive to the demands of the public. The citizens of Georgia will, in large measure, vote for either the Democratic or Republican candidates in the upcoming elections.

Appendix at A-48. Furthermore, Dr. Richard Ottinger, Executive Director of GPTC, stated that the two "front runner" candidates were included in the debates because it was believed that the information presented by them was of greater interest to the public and, therefore, more newsworthy. Appendix at A-49.

The district court made a factual finding that Respondents' reason for excluding Petitioners from the debates was that Respondents believed the Libertarian platform to be less popular than those of the Republican and Democratic candidates. The court found that a decision to exclude a candidate based on the popularity of his or her platform or because the

candidate purportedly is less newsworthy necessarily involves a decision concerning the content of the excluded candidate's speech. Appendix at A-50. Such a decision constitutes content-based discrimination by Respondents in violation of the first amendment.

The Eleventh Circuit majority acknowledged that GPTC made its decision to exclude Petitioner based on "content," but wrongly concluded that such a decision was not improper. The court stated that "[i]t is clear that GPTC 'regulated content' by making a decision to air debates between candidates of the major parties. Contrary to the district court's order, however, *this content-based decision is not viewpoint restrictive* and does not violate the First Amendment." Appendix at A-5,6 (emphasis added).

The Eleventh Circuit determined that Respondents' decision to exclude Petitioners was "reasonable." (Appendix at A-6). However, considerations of the "reasonableness" of the government's actions are completely irrelevant here. In order to pass constitutional muster, the government's justification for the exclusion must satisfy both the strict constitutional standard of the existence of a compelling state interest, and the requirement of a showing that the restriction was narrowly drawn to achieve that interest. *Cornelius*, 473 U.S. at 800. The government's justification in this case satisfies neither. Therefore, the Eleventh circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

II. THE EXCLUSION OF PETITIONERS FROM THE DEBATES WAS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The class of persons involved in the debates was determined by GPTC itself when it decided to hold debates between political contenders for the offices of governor and

lieutenant governor. GPTC subsequently decided to limit participation in the debates to the candidates of the Democratic and Republican parties, thereby excluding Petitioners. GPTC's exclusion of Petitioners was a violation of Petitioners' right to equal protection under the fourteenth amendment.

The district court properly found that Petitioners were members of the same class as the Democratic and Republican candidates, in that "[a]ll are 'ballot-qualified,' meaning, theirs are the only names that will appear on the ballots for [the offices of governor and lieutenant governor]." Appendix at A-54,55. Under Georgia law, Petitioners were qualified to appear on the ballot because they were nominated by a political body which garnered votes equal to at least one percent of the registered voters in the state during the last statewide election. O.C.G.A. § 21-2-180.

Respondents were required to articulate a rational basis for excluding Petitioners from the class of persons allowed to participate in the debates. *See Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). However, Respondents failed to offer any rational or legitimate reason whatsoever for the exclusion. As the district court stated: "the fact that the Libertarian candidates are less popular than the majority parties' candidates is not a rational basis for [their] exclusion." Appendix at A-55.

CONCLUSION

In its most basic essence, this case involves the issue of defining the limits of the state government's power to restrict free speech based on the content of that speech. Clearly, the vital constitutional issues of the first and fourteenth amendment guarantees to free speech and equal protection under the United States Constitution involved in this case are of extreme importance. Because the Eleventh Circuit decision misapplied existing Supreme Court precedent, and creates

dangerous precedent-setting error by vastly expanding the state government's power to restrict free speech based upon its content, this case merits a grant of certiorari by this Court.

The constitutional issues involved would be of extreme importance in any context. However, in the context of government restriction of the speech of a candidate for political office during a political campaign, these issues are of compelling urgency and importance. As Judge Clark stated in his dissenting opinion below: "[p]olitical debate should have the highest rank on the First Amendment's scale of liberties." Appendix at A-12.

The ruling of the court below raises the specter of government control of political ideas during a campaign for political office. If the Eleventh Circuit ruling is not reversed, the government-owned media will be permitted to select which ideas the citizenry will hear, thereby placing its stamp of approval on certain ideas and discounting or ignoring others. The possibility of government influence on the outcome of an election is a very real one. A more serious threat to the basic guarantees of democratic, representative government as guaranteed by the United States Constitution can scarcely be imagined.

For the foregoing reasons, Petitioners respectfully request that the Court grant certiorari to consider the compelling questions of constitutional import presented by this case.

Respectfully submitted,

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